



Craig, R. J. T. (2018). Ouster clauses, separation of powers and the intention of parliament: from *Anisminic* to *Privacy International*. *Public Law*, 4, 570-584.  
<https://uk.westlaw.com/Document/ID53EA620B7B011E8AC35D6541799292D/View/FullText.html>

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***Ouster clauses, separation of powers and the intention of parliament: From Anisminic to Privacy International<sup>1</sup>***

In *Privacy International v Investigatory Powers Tribunal* the courts have been asked to consider again the vexed issue of ouster clauses.<sup>2</sup> The relevant section of the Regulation of Investigatory Powers Act 2000 ('RIPA') purports to oust judicial review of the Investigatory Powers Tribunal ('IPT'). The key issue in *Privacy* is that the wording of the particular ouster clause is ostensibly stronger than the famous *Anisminic* clause.<sup>3</sup> After a split decision in the Divisional Court (in effect), the Court of Appeal unanimously held the ouster was effective to exclude the jurisdiction of the High Court.

This analysis seeks to explore the wider constitutional implications of ouster clauses and, in particular, the relevance of the concept of separation of powers which I have elsewhere described as the neglected 'Cinderella' principle of the constitution.<sup>4</sup> The central argument is that the court's treatment of an attempt by parliament to oust the supervisory jurisdiction of the high court needs to be more nuanced where the apparently immune body is in fact acting in a judicial rather than executive capacity. It is hoped that examining the issues in the light of this important distinction will help to clarify how the courts have in fact developed different tests when dealing with ouster clauses addressed to judicial rather than executive bodies.

This note has three sections. It will first address the *Anisminic* decision. Secondly, it will deal with how later case law applied *Anisminic*. Thirdly it will address the issues raised by *Privacy International* itself. It will be argued that the Supreme Court should uphold the Court of Appeal decision to give full effect to the ouster clause in this case, thus barring judicial review of IPT decisions for error of law.

## **Introduction**

An ouster clause is a provision in an Act of Parliament that purports to prevent a public body from being judicially reviewed. The controversy surrounding such clauses stems from the central importance of the right of ordinary citizens to ensure the legality of decisions made by public bodies via legal action, a principle said to flow from the rule of law. Judicial review is the means by which the legal actions of such bodies are policed by the senior courts. To understand how the courts treat ouster clauses that purport to restrict that right, it is essential to examine closely how public bodies, the courts and parliament interrelate. Mark Elliott has helpfully suggested that

"ouster clauses ... supply a theatre of institutional engagement that enables us to view the workings of the British constitution up close."<sup>5</sup>

This is because the treatment of such clauses is a crucible in which the limits of the relationships between the main constitutional actors are tested and determined. Ouster clauses appear to place into tension two core constitutional principles which are that the will of parliament must be obeyed and that ordinary citizens should be able to challenge public bodies in court in accordance with the rule of law.

## ***Anisminic***

*Anisminic* is now generally seen as the classic example of the treatment of ouster clauses by the courts. The case concerned an application for compensation made by Anisminic Ltd to the Foreign Compensation Commission (the 'FCC'). The compensation was claimed following the confiscation of Anisminic's property after an Egyptian Government nationalisation programme. The Egyptian Government consequently paid an (insufficient) amount to the UK government to recompense those who had been affected. The FCC was

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<sup>1</sup> The author would like to thank the participants at a Society of Legal Scholars Conference on 18-19 May 2018 for their helpful comments on a paper presenting the core ideas, particularly Peter Cane, Maurice Sunkin, Robert Thomas, Alex Latham and TT Arvind. The author would also like to thank Sir Stephen Sedley, Carol Harlow, Tom Hickman, Tom Poole, Gavin Phillipson, Paul Daly, Paul F. Scott and David Feldman for their helpful (and speedy) comments on a previous draft. The usual disclaimer applies.

<sup>2</sup> *Privacy International v Investigatory Powers Tribunal* [2017] EWCA Civ 1868 – decided on 23 November 2017.

<sup>3</sup> *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.

<sup>4</sup> See Robert Craig: 'Black Spiders Weaving Webs: The Constitutional Implications of Executive Veto of Tribunal Determinations' [2016] 79(1) *Modern Law Review* 166-182, particularly pp.171-175, discussing *R (Evans) v Att-Gen* [2015] A.C. 1787.

<sup>5</sup> Mark Elliott, 'Through the Looking-Glass? Ouster Clauses, Statutory Interpretation and the British Constitution', in Hunt, Neudorf and Rankin, *Legislating Statutory Interpretation: Perspectives from the Common Law World* (Carswell: 2018), p.20.

given the task of allocating the money on a complex percentage basis according to how much was found to have been lost.<sup>6</sup> It rejected *Anisminic's* compensation claim, in essence, because it wrongly thought that *Anisminic's* claim had been assigned to a third party, and that *Anisminic* had thereby forfeited its right to compensation from the FCC.

Section 4 (4) of the Foreign Compensation Act, 1950, provides that

"The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law."

The House of Lords held, famously, that the ouster clause did not bite on the determination of the Commission in this case because it had made an error of law, which put the decision it had made outside the jurisdiction granted to it by the Act. This rendered the FCC's apparent determination merely a 'purported' determination - thus neatly circumventing the application of the ouster clause. The decision in *Anisminic* was eventually considered to have swept away the old distinction between errors inside and outside jurisdiction such that when a public body makes a mistake of law, it *always* acts outside its jurisdiction.<sup>7</sup> This novel rule was by no means obvious when the case was originally decided - but became clearer in later case law. The rationale for eviscerating ouster clauses by treating all errors of law as going to jurisdiction is that parliament cannot normally have intended to prevent the courts from patrolling the legal boundaries of administrative action. As Lord Diplock pointed out in a later case, the FCC in *Anisminic* was one of the 'administrative tribunals' at which the ratio of the case was aimed.<sup>8</sup> Crucially, from a separation of powers point of view, the FCC was acting in an *executive* capacity.

### *Separation of powers*

The approach of the courts before *Anisminic* appears to have been underpinned by a particular, and arguably mistaken, view of the separation of powers. The courts were reluctant to intervene when considering issues that were not strictly "judicial" in nature. It would be fair to say that the judiciary now approach these issues from a rather different angle, increasingly influenced by the view that to permit the executive to act without clear legal authority would be contrary to the intention of parliament as expressed in statute, whose limits are enforced by the judiciary. All three aspects of the classical separation of powers doctrine are thereby raised in this line of case law.

*Anisminic* can in one sense be understood as part of the deliberate rethinking of what the separation of powers really requires in this area. If a distinction is drawn between the executive functions of an administrative body and any questions of law that concern it, then it might be thought that separation of powers actually *requires* judicial supervision of administrative bodies who should not be determining the answers to questions of law that frame their decision-making process. The executive determining questions of law would be a breach of the separation of powers. As Nolan LJ said in *M v Home Office*

"the courts will respect all acts of the executive within its lawful province, and ... the executive will respect all decisions of the courts as to what its lawful province is."<sup>9</sup>

Furthermore, this conception of what the separation of powers requires is reconcilable with the sovereignty of parliament because administrative bodies carrying out executive functions cannot have been intended by parliament to be able to act outside the powers it has granted and the courts should be alive to occasions where the line is crossed.<sup>10</sup> More important for this piece is the conceptually different question of what the attitude of the courts is, and should be, to the entirely separate category of cases where there are ouster clauses protecting the exercise of *judicial* functions.

### **Ouster clauses applied to judicial bodies**

In *Privacy*, the relevant body, the IPT, exercises a judicial function. The appropriate analysis of ouster clauses concerning bodies exercising a judicial function is conceptually distinct from the application of such clauses to bodies exercising an executive function. At one level, there is something faintly incongruous about

<sup>6</sup> For a comprehensive discussion, see David Feldman, "*Anisminic v Foreign Compensation Commission*: In perspective", in Juss & Sunkin (eds) *Landmark Cases in Public Law* (Oxford – Portland Oregon: 2017), Chapter 4.

<sup>7</sup> See for example, *O'Reilly v Mackman* [1983] 2 AC 363 per Lord Diplock.

<sup>8</sup> *In Re Racal Communications Ltd* [1981] A.C. 374, 382.

<sup>9</sup> *M v Home Office* [1992] QB 270, 314, adopting a formulation put forward by Stephen Sedley QC in his oral submissions.

<sup>10</sup> Christopher Forsyth, 'Of fig leaves and fairy tales: the ultra vires doctrine, the sovereignty of parliament and judicial review', Forsyth ed. *Judicial Review and the Constitution* (Oxford – Portland Oregon: 2000), pp.29-46.

the idea of a judicial review of a judicial decision. Normally, a challenge to a judicial decision would be by way of an *appeal* to a higher judicial authority, not a judicial review. This is not possible in ouster clause cases because the ouster clause prevents an appeal.

In a series of cases, the supervisory jurisdiction of the High Court over *judicial* bodies has been brought close to, but not entirely in line with the post-*Anisminic* interventionist approach taken by the High Court in dealing with *administrative* bodies. There remains, however, a clear set of circumstances where the writ of the High Court does not run. It will be argued that *Privacy International* falls within those circumstances and the ouster clause applicable in this case should therefore be deemed to be effective. The case law on ouster clauses of bodies with judicial functions in fact sub-divides into two separate categories and the question is the category in which parliament intended to have placed the decision in question.

There can be no doubt that parliament has the power to alter, amend or reallocate the jurisdictional authority of the courts. The post-*Anisminic* story for ouster clauses concerning bodies exercising *judicial* functions begins with the case of *Pearlman* in which Lord Denning MR considered an ouster clause that appeared to govern a decision made by a county court judge in a property dispute.<sup>11</sup> Lord Denning argued that the distinction between errors of law that do and do not go to jurisdiction was

“so fine ...that it is rapidly being eroded ... in truth the High Court has a choice before it whether to interfere with an inferior court on a point of law.”<sup>12</sup>

He went on to say that he thought that

“this distinction should now be discarded... [because] all courts and tribunals, when faced with the same point of law, should decide the same way.”<sup>13</sup>

It will be noted that this rationale is wholly different to the separation of powers rationale for maintaining supervision of executive bodies. The justification for supervision of the executive focuses on the fact that the executive should not be determining the correct interpretation of the law at all and where there is doubt, the judicial view must prevail on this issue. Lord Denning’s view of ouster clauses of judicial bodies centres on the claim that all judicial bodies should decide the law in “the same way”. These rationales are strikingly different: the latter has nothing to do with the separation of powers.

The effect of Lord Denning’s ‘general rule’ would be to replicate the interventionist *Anisminic* approach in relation to ouster clauses protecting the decisions of inferior *judicial* bodies. This would be controversial because it would draw no distinction between the rationales for the treatment of executive and judicial bodies.

Insisting on oversight of the executive is based on the unacceptability of executive power without judicial supervision. Where there is an ouster clause of a *judicial* body, the judicial element of the separation of powers has not in fact been excluded - by definition. The issue is whether the judicial body should be reviewable itself, which is a rather different conceptual question – and arguably a less constitutionally problematic one.

It is not even clear that separation of powers is seriously at stake in the context of ouster clauses relating to judicial bodies because the question in such situations is whether a judicial body should be reviewable by another judicial body. Furthermore, whilst it is unacceptable for the executive to determine questions of law, the power of judicial bodies to interpret the meaning of legislation is universally accepted. It is therefore doubtful that separation of powers is even relevant to the issues in this area, unlike in *Anisminic*-type cases.

Lord Denning was in the majority in *Pearlman*. The dissenting judgment of the future Lord Chief Justice Geoffrey Lane held that

“if this judge is acting outside his jurisdiction, so then is every judge who comes to a wrong decision on a point of law.”<sup>14</sup>

Lane LJ’s narrowly dissenting approach was expressly approved by the House of Lords in *Racal* which is considered next. If Lord Denning’s general rule had been accepted, bodies operating in a judicial capacity

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<sup>11</sup> *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56.

<sup>12</sup> Above, 70.

<sup>13</sup> Above, 70.

<sup>14</sup> Above, 76.

would *always* be overruled whenever they made a mistake of law. This would be to institute, controversially, a *de facto* appeal procedure by judicial fiat because any error of law made by an inferior court would be (in effect) appealable in judicial review proceedings to the High Court.

The two situations can therefore be contrasted. In the *Anisminic* line of cases, separation of powers arguably justifies a restrictive approach to ouster clauses because otherwise the executive can seemingly operate without judicial supervision. By contrast, the existence of judicial supervision of judicial bodies raises no separation of powers concerns. The question of whether all tribunals should decide cases in the same way is arguably a rule of law issue, not a separation of powers issue, and even then the apparent rule of law aspect needs to be weighed carefully against clear parliamentary intention. The rule of law arguments are themselves finely balanced in any event. This is discussed further below. It is suggested that these wider constitutional factors undermine the claim that *Privacy* should be considered as just a matter of statutory construction simply requiring comparison of the language of the *Anisminic* ouster clause and the *Privacy* ouster clause.

### *Racal*

In *Racal*, a High Court judge was asked to exercise a statutory jurisdiction to permit prosecutors to inspect the paperwork of a particular company.<sup>15</sup> He refused the application on a point of statutory construction. Section 441(3) Companies Act 1948 stated that the 'decision of a judge of the High Court... on an application under this section shall not be appealable.' S 441(3) was thus a clear ouster clause. The Court of Appeal disagreed with the judge's decision and made an order reversing the decision of the High Court.<sup>16</sup> Since the judge's decision was not appealable, the reversal in the outcome could not have been a straightforward appeal and was therefore a *de facto* certiorari and a fresh decision *de novo*. This was, *in effect*, an appeal because correcting an error of law in this context is indistinguishable from an appeal. The fact that the Court of Appeal decision clearly circumvented the ouster clause meant that the House of Lords was confronted, inescapably, with the question whether to extend the *Anisminic* interventionist approach beyond just administrative bodies to include decisions made in inferior *courts*, including by a High Court judge.

Lord Diplock expressly rejected the broadening of the *Anisminic* doctrine argued for by Lord Denning. He pointed out that the Court of Appeal's jurisdiction was limited because it had only an appellate jurisdiction rather than any original jurisdiction.<sup>17</sup> A *de facto* consideration of an application to quash the judge's decision amounted to the Court of Appeal hearing a novel judicial review claim which was outside its jurisdiction as well as, incidentally, outside the House of Lords jurisdiction. This was because neither court had original jurisdiction.

Lord Diplock went on to consider whether judicial review could lie against a court decision in general. He expressly distinguished *Anisminic* on the basis that it was dealing with bodies acting in an *administrative* capacity rather than judicial capacity and claimed that the case created a "presumption" with administrative decisions that where there is any doubt about the question to be answered, the courts must "resolve" it "as interpreters of the written law".<sup>18</sup> Distinguishing the *Anisminic* line of case law in this way must be correct, not least on the separation of powers grounds already argued.

Lord Diplock went on to hold that "there is no such presumption where a decision-making power is conferred by statute upon a court of law".<sup>19</sup> Each case "depends on the construction of the statute" but a

"superior court conducting the review should not be astute to hold that Parliament did not intend the inferior court to have jurisdiction to decide for itself."<sup>20</sup>

The double negative is confusing but in essence, Lord Diplock held that where parliament intended to oust the jurisdiction of the High Court over inferior *courts*, such clauses should be more generously construed than clauses concerning executive bodies. The reason for the different treatment could simply be the *lack* of separation of powers implications when considering judicial supervision of courts. In those constitutional

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<sup>15</sup> *In re Racal Communications Ltd* [1981] AC 374, 384.

<sup>16</sup> *In re Racal Communications Ltd* [1980] Ch. 138.

<sup>17</sup> Above, n 15, 392.

<sup>18</sup> Above, 382-3.

<sup>19</sup> Above, 383.

<sup>20</sup> Above.

circumstances, parliament's linguistic clarity burden may be considerably diminished. Lord Hoffmann's principle of legality may be more easily satisfied.<sup>21</sup>

*A potential bright line distinction*

The implications of Lord Diplock's important judgment could have been profound. If a genuine and bright line distinction had been drawn between ouster clauses protecting administrative decisions and those protecting judicial decisions, then a clear and logical approach could have been easily discerned and defended. It would make complete sense to insist on the clearest possible language before *administrative* bodies could determine questions of law themselves, precisely because it is the constitutional function of the courts to interpret the written law as set down by parliament. *Judicial* decisions would be a different matter because the issue in such cases is whether parliament intends there to be deviations from the general law.

This distinction drawn between review of administrative and judicial bodies has some support in recent case law. *A v B* concerned a judicial review brought by a former Security Service agent against the decision to refuse him permission to publish a book.<sup>22</sup> The issue was whether the claim had to be heard in the IPT. Although the issue of the effectiveness of the ouster clause was *obiter*, Lord Brown said that Parliament had "not ousted judicial scrutiny of the acts of the intelligence services; it [had] simply allocated that scrutiny... to the IPT".<sup>23</sup> Lord Brown's heavyweight endorsement of the view that the ouster clause in RIPA was an effective one was described by Sales LJ as "powerful persuasive authority" and "a considered view expressed as part of a very careful analysis of the IPT regime established by RIPA".<sup>24</sup> Most importantly, perhaps, it is consistent with the claim that RIPA *reallocates* rather than ousts judicial supervisory authority.

Unfortunately, the bright line distinction drawn by Lord Diplock, and arguably supported by Lord Brown, has not persisted and the courts have moved much closer to Denning's general rule in *Pearlman* for reasons that are somewhat difficult to discern. In *O'Reilly v Mackman*, Lord Diplock himself appeared to have changed his mind on the applicability of the distinction he himself had drawn in *Racal*.<sup>25</sup> As Wade points out, "according to [Lord Diplock's] gospel... all error of law by an inferior tribunal *or court* amounts to excess of jurisdiction".<sup>26</sup> Wade goes on to say that the *Page* case (to which we must now turn) "decided unanimously that Lord Diplock's gospel is canonical".<sup>27</sup>

*Page*

The next stage in the story is the House of Lords decision in *Page*.<sup>28</sup> It diverges considerably from the bright line distinction seemingly drawn between judicial and administrative decisions in *Racal*. Interestingly, the case concerned judicial review of a judicial body without any statutory involvement. It therefore does not raise any issues relating to the doctrine of separation of powers, by contrast with examples in the *Anisminic* line of case law. As argued earlier, this could justify a more nuanced and differentiated approach in this self-contained area of the common law because the constitutional issues at stake are strikingly different.

The case concerned a claim by a university lecturer whose employment had been terminated for redundancy. The applicant sought a declaration that the dismissal was unlawful from the 'University Visitor' who had an exclusive jurisdiction to consider such claims in a university context and was at all times acting in a judicial capacity. The declaration sought was refused, which prompted the applicant to seek judicial review of the refusal against the Lord President of the Privy Council acting on behalf of the Visitor. The House of Lords held, (by 3-2) that the long history of exclusive jurisdiction of University Visitors meant that the High Court had no jurisdiction to entertain the application.

The crucial development in the approach of the courts was set out by Lord Browne-Wilkinson. His judgment makes clear that the *Anisminic* interventionist approach now applies not just to administrative bodies but also to inferior bodies acting in a *judicial* capacity. The judge said

"in general any error of law made by an administrative tribunal or inferior court in reaching its decision can be quashed for error of law."<sup>29</sup>

<sup>21</sup> *Secretary of State for the Home Department, Ex Parte Simms* [2000] 2 AC 115.

<sup>22</sup> *A v B* [2010] 2 AC, 32, para [23].

<sup>23</sup> Above, para [23].

<sup>24</sup> Above n 2, para [48].

<sup>25</sup> *O'Reilly v Mackman* [1983] 2 AC 237, 279.

<sup>26</sup> Wade "Visitors and error of law", (1993) LQR 155, 157 (emphasis added).

<sup>27</sup> Above.

<sup>28</sup> *R v Lord President of the Privy Council, Ex parte Page* [1993] A.C. 682.

<sup>29</sup> Above, 702.

Given the broad nature of this ruling, it might be wondered why in the particular case of *Page*, the visitor was *not* subjected to judicial review jurisdiction. Lord Browne-Wilkinson says that for the visitors, it was *as if* there was a 'final and conclusive' clause covering the visitors' jurisdiction.<sup>30</sup> There was therefore no jurisdiction for the High Court to review.

The last point may appear somewhat confusing. Given *Page* confirmed that ouster clauses are generally ineffective, the reference to an ouster clause as being operative in this case might seem somewhat odd given Lord Browne-Wilkinson stated that 'in general' ouster clauses are *not* effective. (This is without even addressing the fact that in *Page* there was in fact no "final and conclusive" clause because there was no statute). The resolution of this wrinkle is that Lord Browne-Wilkinson's judgment reveals a *sub*-category of judicial bodies that are exempt from the *general* rule that bodies (whether executive or judicial) that make an error of law are judicially reviewable.

The relevant test is whether the jurisdiction of the judicial body is meant to comply with the "general law of the land".<sup>31</sup> This is arguably rooted in Lord Denning's claim that tribunals should generally decide the law "in the same way".<sup>32</sup> It is also conceptually and analytically distinct from the justificatory underpinnings for judicial supervision of executive decisions.

It might be thought that it is axiomatic that *all* areas of law should be compliant with the "general law". This is clearly disproved by *Page*. The court held that the University Visitor

"is applying not the general law of the land but a peculiar, domestic law of which he is the sole arbiter and of which the courts have no cognisance."<sup>33</sup>

To be clear, this test in effect revived, for a small sub-category of cases, the old test of errors of law inside and outside jurisdiction. The University Visitor had the power to make decisions within his jurisdiction that the senior courts could not inquire into. This confirms the possibility of 'islands' of local law if the particular case falls within the *sub*-category set out above. Courts with differing jurisdictions have a long history in the common law. It is not obvious what principled basis prevents parliament reinstituting differential jurisdictions if it so desires. The rule of law does not require one universal law. At most it requires access to independent judicial adjudication which is not the same thing at all.

For the *majority* of situations, it must be remembered, the rule is that inferior courts must comply with the general law of the land and ouster clauses in such situations will be ineffective without crystal clear words. The courts work on the assumption that parliament intends the general law to be consistent unless it makes a contrary intention absolutely clear in accordance with the principle of legality.

There are a number of useful examples that illustrate the new, settled, rule that in general, ouster clauses concerning judicial bodies should be narrowly construed. In *Woolas*, an Election Court constituted under s 123 of the Representation of the People Act 1983 was judicially reviewed for an error of law and the High Court determined that it had jurisdiction to quash the decision of the Election Court in judicial review proceedings even though there was a clear ouster clause in s 144(1) of the 1983 Act.<sup>34</sup>

The reason *Woolas* was decided this way was because it was unsustainable to claim that the Election Court had the power to make errors of law. There was no realistic basis for claiming parliament had genuinely intended to create an island of local law under the relevant Act. This case therefore illustrates the application of the *general* rule, following *Page*, to an inferior court. A good second example is the decision in *U v SIAC* where Laws LJ made a similar point about the tribunal which operated in a judicial capacity.<sup>35</sup>

There are thus two categories concerning judicial review of judicial bodies. The general rule is that judicial bodies must comply with the "general law of the land". *Page* shows that there may, however, be legacy examples of judicial bodies with jurisdictional autonomy. In addition, and exceptionally, parliament may make clear that it intends that deviation from the general law can occur. When this happens, parliament creates an island of local law that is immune from judicial review. The next case is arguably a good example of such an intention, although the Supreme Court disagreed with the lower courts on this point.

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<sup>30</sup> Above, 703.

<sup>31</sup> Above, 702.

<sup>32</sup> Above, n 13.

<sup>33</sup> Above, 702.

<sup>34</sup> *R (Woolas) v Parliamentary Election Court* [2012] QB 1.

<sup>35</sup> [2011] Q.B. 120.

*Application to Cart*<sup>36</sup>

The *Cart* decision can only be addressed briefly here. Crucially, it also concerns judicial review of judicial decisions. *Cart* concerned whether the Upper Tribunal, as a “superior court of record”, could be subject to judicial review.<sup>37</sup> The Upper Tribunal was set up to be the apex of the tribunal system under the Tribunals Courts and Enforcement Act 2007. Laws LJ in the Divisional Court was persuaded that parliament had conferred on the Upper Tribunal the power to determine the law within its jurisdiction without the possibility of review for error of law. This was a particularly notable finding given that Laws LJ is a leading proponent of the alleged general, unlimited common law jurisdiction of the High Court.<sup>38</sup>

Sedley LJ for a unanimous Court of Appeal took a not dissimilar approach on the core issue.<sup>39</sup> Crucially, he drew the precise distinction set out in *Page* earlier. He specifically claimed that a “mere error of law made in the course of an adjudication” was insufficient for the court to have judicial review jurisdiction.<sup>40</sup> He based this on the fact that “the model of judicial review... which seems to us to implement Parliament's intent ... is one which secures the boundaries of the system but does not invade it”.<sup>41</sup> This in effect applied the *Page* test and specifically recognised that the Upper Tribunal had a mandate from parliament to determine the relevant applicable law such that the senior courts could not inquire whether there has been an error of law by the Upper Tribunal when exercising its judicial functions. The new structure of the Tribunal system and the evident desire of parliament to make it, basically, autonomous makes Sedley LJ's reasoning compelling.

Unfortunately, the Supreme Court blurred the clear “boundaries” mapped out by Sedley LJ. It held that the criteria for permitting judicial review of a decision of the Upper Tribunal should be the ‘second appeal’ criteria; namely that appeal is allowed if an important point of principle or practice is raised or there is some other “compelling reason”. In such circumstances judicial review of an Upper Tribunal decision would lie. This was said to be a pragmatic compromise between the two extremes of full judicial review and the narrow pre-*Anisminic* jurisdictional test set out in *Page* and effectively applied by Sedley LJ in the court below. Unfortunately, as with many compromises that fudge hard choices, the decision simply falls between two stools, capturing the worst of both worlds.

On the one hand, it accepts that in many (perhaps even most) cases, the UT will be permitted to make errors of law within jurisdiction without review. This nicely coincides with the recognition in the Divisional Court and Court of Appeal that parliament clearly intended to create a separate and self-contained jurisdiction, supervised by the Upper Tribunal acting as a court and that, most of the time, matters of law will not be reviewed if determined within jurisdiction. This acceptance is fatal for the contrary claim that *all* errors of law are necessarily outside of jurisdiction absent the clearest possible language. That bright line rule underpins *Anisminic* but only applies to administrative bodies, not judicial bodies because, as we have seen, the courts have applied a different, more nuanced, test to bodies exercising a judicial function. Furthermore, the constitutional *rationales* are completely different.

At the same time, and somewhat inconsistently, *Cart* is also now authority for the proposition that if it is claimed that the Upper Tribunal has made an *important* error of law, *judicial review* will lie (not an appeal). This undermines the claim that parliament intended to confer a separate jurisdiction for the Upper Tribunal. If parliament in fact did *not* intend to grant such a jurisdiction to make errors of law, judicial review should arguably lie in *all* cases. This is because if parliament did not intend for it to be able to err in law, the Upper Tribunal should comply with the general law as *Page* laid down. The binary question of whether the tribunal system was intended to comply with the general law is a question of parliamentary intention, *not* judicial discretion.

This case therefore must raise concerns about the extent to which parliament is being restricted, by the courts, in its ability to alter, amend or reallocate the statutory jurisdiction of the courts and other bodies exercising judicial functions. It is problematic, conceptually and constitutionally, for the courts to create - out of thin air - a highly specialised *appeal* process that is normally used in specific and narrow circumstances laid down by parliament and label it ‘judicial review’. This is particularly the case for a body exercising a judicial function that the courts have simultaneously accepted has had conferred on it, by parliament, the authority and jurisdiction to determine the law within its jurisdiction without review by the senior courts. The

<sup>36</sup> *R (Cart) v Upper Tribunal* [2012] 1 A.C. 663.

<sup>37</sup> S 3(5) Tribunals Courts and Enforcement Act 2007.

<sup>38</sup> Laws “Illegality: The problem of jurisdiction” in Supperstone & Goudie (eds) *Judicial Review* (Butterworths: 1992), p.51.

<sup>39</sup> *R (Cart) v Upper Tribunal (Court of Appeal)* [2011] QB 120.

<sup>40</sup> Above, para [36].

<sup>41</sup> Above, para [42].



imposition of a second appeal test on the Upper tribunal in *Cart* is arguably an example of unwarranted judicial legislation. The sovereignty of parliament, in the Diceyan sense, was thereby compromised.<sup>42</sup> It is important to recognise that judicial legislation like this is also a breach of the separation of powers, but in a completely different way from the earlier discussion.

### Privacy International

*Privacy International* concerned whether the intelligence services could justify the use of a general warrant to engage in 'computer hacking' ostensibly under s 5 of the Intelligence Services Act 1994. Judicial review was sought against a decision made by the IPT. The IPT was set up by statute to permit the legality of actions taken by the security services to be tested independently by a body exercising a judicial function. The IPT exercises a judicial function because it deals only with questions of law not the merits of substantive decisions by the security services.

Furthermore, the IPT is the *only* available forum for actions against the intelligence services under s 7 of the Human Rights Act 1998 (actions under s 7 must be considered by a judicial body).<sup>43</sup> The IPT may be *labelled* a "tribunal" but it acts as a court. What matters is that the *function* of the relevant body in the particular case is carefully assessed and classified. This should happen in every case where ouster clauses are considered in order to maintain a clear distinction between ouster clauses attached to bodies exercising administrative functions and those exercising judicial functions. It is the function exercised that matters, not the label appended.<sup>44</sup>

Section 67(8) of RIPA states:

"Determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court."

This clause can be contrasted with the ouster clause in *Anisminic* which stated that:

"The determination by the commission of any application made to them under this Act shall not be called in question in any court of law."

Comparing just the language of the two ouster clauses (notwithstanding earlier discussion) demonstrates that the *Privacy* clause is clearly more robust than the original *Anisminic* clause. In particular, the words in brackets repay careful consideration. At first sight, they appear to grant to the IPT the power to determine its own jurisdiction *qua court* in a way that makes it challenging to see how the High Court could justifiably exercise any supervisory jurisdiction over determinations of law by the IPT.

The linguistic differences between the two clauses were not sufficient to persuade Leggatt J (as he then was) sitting in the Divisional Court with Lord Justice Leveson PQBD.<sup>45</sup> Leggatt's view was that the treatment of the wording in *Anisminic* was not materially different to the treatment that would be required to impose a similar supervisory jurisdiction by the High Court in the case of the IPT. Leggatt adopted what might be called the Denning-style broad approach in his decision and rested his judgment on his view of the necessary requirements of the rule of law. His primary focus was attacking the possibility of there being any 'legal island[s]' that are outside the jurisdiction of the senior courts.<sup>46</sup> He said:

"The reason why the High Court exercises a supervisory jurisdiction over all lower courts and statutory tribunals is to maintain the rule of law."<sup>47</sup>

Leggatt insisted that judicial review of judicial bodies that are undertaking judicial review proceedings should be possible. It is suggested that Leggatt's fairly narrow conception of the rule of law is open to challenge. The rule of law does not require hegemony. The IPT is an independent judicial body with prospective, clear,

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<sup>42</sup> See also Boughey and Burton Crawford, 'Reconsidering *R (Cart) v Upper Tribunal* and the rationale for jurisdictional error', [2012] *Public Law* 592.

<sup>43</sup> See s 65(2) and s 65(3) of the Regulation of Investigatory Powers Act 2000.

<sup>44</sup> The author has argued elsewhere for greater definitional clarity in classifying whether bodies are exercising executive or judicial functions. See n 4, above, discussing *Evans v Attorney-General* [2015] A.C. 1787.

<sup>45</sup> *Privacy International v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin), 2<sup>nd</sup> February 2017

<sup>46</sup> Above, para [49].

<sup>47</sup> Above. per Leggatt J, para [48]. See also Paul F. Scott, "Ouster clauses and national security: judicial review of the Investigatory Powers Tribunal", [2017] *Public Law* 355-362.

open, stable and general rules that have been set out in advance with hearings that are subject to the rules of natural justice.<sup>48</sup> This tends to undermine any claims that the absence of an appeal procedure from the IPT *necessarily* breaches basic rule of law principles. Much more in-depth analytical justification would be required to make that claim good. No one is denied access to a court by s 67(8) RIPA.

It is difficult to see how the absence of the right to an *appeal* undermines the right to independent judicial adjudication to the extent that a fundamental breach of the rule of law has occurred that could in turn justify the highly strained reading of the clear words of the statute suggested by Leggatt J. In the sense of ensuring there is access to a court, this case is far removed from *Anisminic*. To the extent the application to the Supreme Court relies on a generic appeal to the rule of law as its core thesis, the argument is weak.

Furthermore, it is important to consider the damage to the clarity and certainty the rule of law is meant to promote if the courts were to disregard the wording of s 67(8) RIPA and the clear intention of parliament. Demanding crystal clear words where otherwise the executive could operate outside the law is one thing. Insisting that parliament cannot prevent the senior courts imposing their interpretation of RIPA on the IPT in the teeth of parliamentary intention to the contrary is quite another. The words in brackets are particularly clear about parliament's intention as to who has final say on the jurisdiction of the IPT. Imposing a higher burden of linguistic clarity on parliament requires substantially greater justification than vague and semi-articulated appeals to the "rule of law".

Leveson PQBD in the Divisional Court, and Sales LJ for a unanimous Court of Appeal, took a radically different view to Leggatt J.<sup>49</sup> Their approach is consistent with the test in *Page* and the views of Sedley LJ in *Cart*. Crucially, the Investigatory Powers Act 2016 amended RIPA to introduce 'second tier' appeal requirements on the IPT but the later Act was not passed until a date *after* the hearing in this matter. The main implication of this is that it would arguably be inappropriate for the Supreme Court to impose the same test in *Privacy* as was applied by the Supreme Court in *Cart*. This is because if parliament had intended there to be a second-tier appeal mechanism that was *in fact* introduced at a later stage then it would have done so from the beginning when the legislation was originally passed. Reading such a mechanism into the statute would be further judicial legislation usurping the role and function of parliament. It is difficult to see how the Cartian dilemma can be avoided this time.

It is suggested that the intention of parliament when it created a judicial framework to consider the legality of activities of the security services was to create a regime that was distinct from the general law. Parliament intended that the IPT could make uncorrected errors of law precisely because it was additionally granted the power to address questions about its own jurisdiction, as Sales LJ efficiently argued in the Court of Appeal.<sup>50</sup> Sales bolstered his argument by considering the detailed rules about what information could be adduced in evidence and the confidentiality with which such information was treated by the IPT.<sup>51</sup>

The determinative factor, of course, must be the meaning and effect of the ouster clause itself in all the circumstances. It appears to confer on the IPT the right to determine the limits of its own jurisdiction. Taking a step back for a moment, it must be repeated that the constitutional *context* is crucial. Where parliament is simply *reallocating* judicial supervision, Lord Diplock's exhortation to the courts that they "should not be astute hold that Parliament did not intend the inferior court to have jurisdiction" is particularly pertinent.<sup>52</sup> This approach must be even more relevant when the ouster clause itself appears to make clear that questions of jurisdiction are also a matter for the IPT.<sup>53</sup> The IPT is a judicial body that, it is suggested, parliament intended

<sup>48</sup> Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979), pp. 214-219.

<sup>49</sup> Above and n 2, above.

<sup>50</sup> *Privacy*, n 2, above.

<sup>51</sup> Sales LJ's ancillary argument must lose much of its force in the light of the recent decision in the Supreme Court to hold that "judicial review can and must accommodate a closed material procedure, where that is the procedure which Parliament has authorised in the lower court or tribunal whose decision is under review". *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, para [59].

<sup>52</sup> Above, n 20.

<sup>53</sup> This takes nothing away from the power of the courts to intervene in the unlikely scenario where the IPT acts genuinely outside its jurisdiction in the historic pre-*Anisminic* sense. It is important to emphasise that making an error of law within the jurisdiction conferred by parliament must be clearly conceptually distinguished from genuinely doing something parliament did not intend the IPT to be able to do at all. To take an absurd example, if the IPT started deciding social security claims, that would be *ultra vires* in the narrow pre-*Anisminic* sense. This crucial distinction was recognised explicitly by, for example, Sedley LJ in *Cart* at n 39. Parliament gave no indication that, say, a decision tinged by a "real possibility of bias" should be protected. As *Pinochet* ([2000] 1 A.C. 119) showed, even the apex court can be judicially reviewed on such a basis. As always, the key is discerning parliament's actual intention. This note suggests parliament intended the IPT to be able to make errors of law within its jurisdiction. There is no evidence whatsoever that parliament intended the IPT to be able to make decisions on social security disputes or be able to make decisions tainted by a real

to be able to determine the law within its jurisdiction without review. It has its own jurisdiction. The IPT ouster clause should be effective.

### Conclusion

This note has attempted to clarify the courts' approach to attempts to oust the jurisdiction of the High Court. As virtually every judge says when determining the effect of ouster clauses, parliament has the power to oust judicial review if it says so clearly enough – the crucial question is always what parliament intended. It has been suggested that when considering how separation of powers affects the analysis, a distinction should be drawn between ouster clauses addressed to administrative and judicial bodies.

The case law is clear that ousting the jurisdiction of the High Court to supervise *administrative* bodies would require exceptionally clear words in all cases. Separately, the courts have interpreted ouster clauses for *judicial* bodies in two distinct ways, creating two categories in the case law. The main category applies a general rule where parliament has not demonstrated the intention of conferring the power to make errors of law on a particular judicial body with sufficiently clear words; such ouster clauses will be narrowly construed.

By contrast, where parliament *has* indicated sufficiently clearly that it intends the senior courts not to be able to review a body exercising a judicial function, that falls into a separate sub-category. Such judicial bodies have their own jurisdiction. It is rare for parliament to indicate that this is its intention. Arguably, *Cart* was one such example and Sedley LJ's judgment is to be preferred to the Supreme Court because it recognises that parliament did in that case intend that the tribunal system would be, basically, autonomous. *Privacy* provides us with another example. The recognition of these exceptions by the courts has not been a bold step into unknown territory. Islands of local law have long been recognised by the courts, as *Page* proves.

In *Privacy*, and arguably *Cart*, parliament intended to reallocate judicial supervision usually undertaken by the High Court to a new statutory body operating in a judicial capacity that cannot itself be judicially reviewed by the High Court for error of law. This clear parliamentary intention should be respected. Following *Page*, the possibility of effective ouster clauses covering some specific judicial bodies should be recognised by the courts where the intention of parliament is clear, bearing in mind that the courts have historically applied a different approach to bodies exercising judicial functions as opposed to bodies exercising executive functions. Finally, it is generally suggested that a core constitutional principle, the separation of powers, should be given more prominent consideration in determining the issues in areas such as this.